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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1823

GARY VAN GUNDY
and
RIVERGATE NEWS AGENCY, INC.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 6

Statement 6

Reasons for Granting the Writ 21

Conclusion 46

INDEX TO APPENDIX

Appendix A. Opinion and Judgment of the Court of Appeals 1
Appendix B. Order Denying Rehearing 4
Appendix C. Constitutional and Statutory Provisions 5

TABLE OF CITATIONS

Cases

Bailey v. Alabama, 219 U.S. 219 35
Borden's Farm Products Co., Inc. v. Baldwin, 392 U.S. 194 42
Burgin v. South Carolina, 404 U.S. 806 39
California v. Pinkus, 400 U.S. 922 39

Page

Chastleton Corp. v. Sinclair, 264 U.S. 543 42
Cole v. Arkansas, 333 U.S. 196 29,33
Communist Party v. S.A.C.B., 351 U.S. 115 31
Cool v. United States, 93 S.Ct. 354 37
Cote v. U.S.A., 485 F.1d 574 (9-11-73) 44
De Jonge v. Oregon, 299 U.S. 353 29,33
Elkins v. United States, 364 U.S. 206 22
Ginzburg v. United States, 383 U.S. 463 14
Gooding v. Wilson, 405 U.S. 518 30,33
Grayned v. City of Rockford, 408 U.S. 104 30
Grunewald v. United States, 353 U.S. 391 22
Hamling, et al v. United States, October Term, 1973, No. 73-507 29,34
Lewis v. New Orleans, 94 S.Ct. 970 30
Manual Enterprises v. Day, 370 U.S. 478, 483, 484 n.5 (1962) 23
Marshall v. United States, 360 U.S. 310 22
McNabb v. United States, 318 U.S. 332 21
Memoirs v. Massachusetts, 383 U.S. 413 . . . . . .4,5,19,20,21, ...24,25,27,28,29,33,38,42,43
Mesarosh v. United States, 352 U.S. 1 29
Miller v. California, 413 U.S. 15 . . . . . .3,19,21,24,25,27, ... 28,29,42,43,44,45
Mishkin v. New York, 383 U.S. 508 38
New York Times Co. v. Sullivan, 376 U.S. 254 35
Papachristou v. City of Jacksonville, 405 U.S. 156 30,33
Paris Adult Theatre I v. Slaton, 413 U.S. 73 25,41
Pinkus v. Pitchess, 429 F.2d 416 (9 Cir.) 39
Plummer v. City of Columbus, 94 S.Ct. 17 30
Rabe v. Washington, 405 U.S. 313 29,33
Redrup v. New York, 386 U.S. 767 9
Russell v. United States, 369 U.S. 749 33
Saldana v. United States, 365 U.S. 147 22
Smith v. California, 361 U.S. 147 34,35
Smith v. Goguen, 94 S.Ct. 1242 30,33
Speiser v. Randall, 357 U.S. 513 35
Thevis and Peachtree News Co., Inc. v. United States, October Term, 1973, No. 73-1075 28,29
Tot v. United States, 319 U.S. 463 35

Page

U.S.A. v. Ewing, 491, F.2d 714 (2-4-74) 45
U.S.A.v. Friedman, et al., 488 F.2d1141
(10 Cir. 1974) 28,45
U.S.A. v. Groener, No. 71-1091 (5-24-74) 44
U.S.A. v. Henson, Unrep. (9 Cir. No. 73-2063,
October 5, 1973 28
United States v. Hill, 464 F.1d 1287 (9 Cir.
1972) 36
United States v. Jiminez-Serrato, 451 F.2d 523
(5 Cir. 1971) 37
United States v. New Orleans Book Mart, Inc., et
al., 490 F.2d 73 (5 Cir. 1974) 20,44
United States v. New Orleans Book Mart, Inc., et
al., No. 71-2594 28
United States v. Palladino, 490 F.2d 499 (1 Cir.
1974) 28,42
United States v. Robel, 389 U.S. 258 30
United States v. Rodgers, 419 F.2d 1315 (10 Cir.
1970) 36
United States v. Sulaiman, et al., 490 F.2d 78
(2-19-74) 44
United States v. Thevis and Peachtree News Company,
Inc., 484 F.2d 1149 19,29,44
United States v. 12 200-Ft. Reels of Film, 413 U.S.
123 29
United States v. Vuitch, 402 U.S. 62 33
Weiner v. California, 404 U.S. 988 39
Winship, In Re, 397 U.S. 358 37
Yates v. United States,356 U.S. 363 22

Statutes

United States Code, Title 18, Sec. 1462 5,6,7,29
United States Code, Title 18, Sec. 1465 20
United States Code, Title 28, Sec. 1245(1) 2
United States Constitution, Art. I, Sec. 9 6
United States Constitution, First Amendment 6,40

Page

United States Constitution,
Fifth Amendment 6,33,40
United States Constitution, Sixth
Amendment 6,32,33,40
United States Constitution, Eighth Amendment 6

Textbook

1 Wigmore, Evidence (3d Ed. 1940),
Sec. 29 42

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
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COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Gary Van Gundy and Rivergate News Agency, Inc., respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 19, 1974.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 490 F.2d 76, and appears in Appendix "A" hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 19, 1974 (Appendix "A"). A due and timely Petition for Rehearing and Petition for Rehearing *En Banc* was filed by petitioners and denied by the Court of Appeals by order entered on April 3, 1974. A copy of the letter from the clerk of the Court of Appeals advising petitioner of the entry of the said order is attached hereto as Appendix "B". On April 22, 1974, the Court of Appeals granted a stay of the issuance of the mandate. On May 2, 1974, Mr. Justice Powell made an order extending the time for filing a Petition for Writ of Certiorari in the cause to and including June 3, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court in the exercise of its supervisory power over the administration of criminal justice in the federal courts should reverse the judgment of conviction herein upon the ground that the petitioners were charged and tried prior to June 21, 1973, under vague, ambiguous, uncertain and unworkable standards for judging obscenity, without fair notice or hearing, thus unjustly depriving petitioners of a fair trial with resultant conviction and affirmance in a concededly "no man's land," all contrary to established civilized standards of procedure and evidence ordinarily maintained in federal courts.

2. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioners herein, was unconstitutionally vague, violating the First and Fifth Amendments, because:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent;

(c) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(d) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under Section 1462.

3. Whether the indictment in statutory language is fatally defective because it failed to inform petitioners of the nature and cause of the indictment against him, in violation of the applicable provisions of the Sixth Amendment.

4. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioners herein, under a standard for judging *scienter* solely by alleged proof of knowledge of the "contents" of the publications involved, abridge the exercise of freedoms of speech and press and arbitrarily deprive petitioners of their liberty and property without due process of law, in violation of the First and Fifth Amendments.

5. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioners herein, without any competent evidence to establish that petitioner Van Gundy or agents of corporate petitioner even possessed knowledge of the alleged contents of the publications, abridges the exercise of freedoms of speech and press and arbitrarily deprive petitioner Van Gundy of his liberty and his property and that of petitioner corporation without due process of law, in violation of the First and Fifth Amendments.

6. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioners herein, where the indictment, trial, and conviction of petitioners were concededly governed only by the standards for judging obscenity enunciated in *Memoirs*, and where the government presented no competent evidence that the publications exceeded national community standards, appealed to prurient interest, or were utterly without redeeming social value, and where the undisputed record established that the publications

did not exceed national community standards, did not appeal to prurient interest, and had educational and other social value, violates the free speech and press and due process provisions of the First and Fifth Amendments.

7. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioners herein, where the publications named in the indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First and Fifth Amendments.

8. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioner on the issues of non-obscenity of the publications and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioner Van Gundy of his liberty and his and corporate Defendant's property without due process of law, and deny petitioners the right to a fair trial in violation of the First, Fifth and Sixth Amendments.

9. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioners herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs* and *Miller* tests by the Court of Appeals, abridged the exercise of freedoms of speech and press, arbitrarily deprive petitioner Van Gundy of his liberty

without due process of law, constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, deprive petitioners of a right to a jury trial on the issue of the alleged obscenity of the publications, all in violation of the First, Fifth and Sixth Amendments and Article I, § 9. Whether Certiorari should be granted because there is a substantial conflict between the Circuit Courts or Appeals in connection with the application of Miller standards to convict occurring prior to the date of that decision?

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments, and Article I, § 9 of the Constitution, and the pertinent provisions of 18 U.S.C. § 1462, appear in Appendix "C" hereto.

STATEMENT.

1. The four-count indictment returned on December 28, 1971, named three individuals, Michael G. Thevis, Frederick E. Lund and Gary Van Gundy, and a corporate defendant, Rivergate News Agency, Inc. (A. 1-3).[1] With respect to Counts I and II of the indictment, the jury returned verdicts of not guilty. Guilty verdicts were returned only with respect to Counts III and IV of the indictment (A. 3529-3530).

Each of the counts of the indictment alleged that the defendants did knowingly bring into New Orleans, Louisiana, by means of common carrier and did knowingly receive from

[1] The reference "A" is to the six-volume appendix filed with the Court of Appeals below. A motion for mistrial on behalf of defendant Lund because of illness during the trial was granted (A. 3076).

the common carrier an alleged obscene publication, in violation of 18 U.S.C. §§ 1462 and 2. Count III alleged that a magazine entitle "L'Affaire No. 7" [Gov. Ex. 11; A. 851, 852] had been so brought into New Orleans, Louisiana, from the State of New York on June 1, 1971 (A.2). Count IV alleged that a book entitled *Wild Sexual Compulsions* [Gov. Ex. 10; A.851, 852] had been so brought into New Orleans, Louisiana, from the State of California on July 8, 1971 (A.2).

The verdicts of the jury were returned on June 3, 1972. The judgments of conviction were entered on August 4, 1972 (A. 3607). The petitioner Van Gundy was sentenced to imprisonment for a period of eighteen months on Count III and eighteen months on Count IV, the sentence imposed on Count IV to run concurrently with the sentence imposed on Count III. The Court imposed a sentence of five thousand dollars ($5,000.00) on each count.

2. Following the return of the indictment, the petitioners filed pretrial motions. The motion to dismiss the indictment alleged that the indictment, and each and every count thereof, failed to state facts sufficient to constitute an offense against the United States; failed to allege the essential elements of "obscenity" and the essential elements of guilty knowledge and specific intent; and, in addition, that 18 U.S.C. § 1462, on its face and as construed and applied, violated the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amendments and other pertinent constitutional provisions. Petitioners also moved the court to dismiss the indictment upon the ground that the publications referred to in each and every count of the indictment were not obscene and were constitutionally protected, and requested an evidentiary hearing in connection with the

motion, offering to produce oral testimony and to file with the court materials comparable to the publications which had been adjudicated as being protected by the free speech and press provisions of the First Amendment.

Petitioners also moved the court for a bill of particulars. Among other things, the government was requested to state whether it claimed that each of the publications aforementioned substantially exceeded contemporary community standards in the nation as a whole in the depiction and representation of sex and nudity; whether it was claimed that each of such publications appealed to the prurient interest of the average person in the nation as a whole; and whether it was claimed that each of the publications was without ideas and without literary, artistic, psychological, informational or entertainment value and utterly without redeeming social importance. With respect to the issue of *scienter*, the government was requested to state whether it was claimed that each of the defendants knew that the publications were "obscene, lewd, lascivious, and filthy matter of an indecent character," or knew the contents of the material; whether it was claimed that each of the defendants intentionally received from the common carrier obscene publications or received the publications knowing the contents, or received the publications knowing them to be obscene, or received the publications knowing them to be obscene with the specific intent to distribute them to minors or to thrust them upon persons who desired not to be exposed to such publications. The government was also requested to state whether the terms "obscene," "lewd," "lascivious" and "filthy matter of an indecent character" had the same or different meanings and to state the meaning of each of the said terms.

The government's answer to the said motion for a bill of particulars was that "implicit in an allegation of obscenity" as to the publications named in the indictment was the allegation that the publications go substantially beyond customary limits of candor in the nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion, and that "implicit in an allegation of obscenity" is the claim that the material appeals "to the prurient interest of the average person or to a member of a deviant sexual group" the government contending that there was no requirement to show prurient interest of the average person "in the nation as a whole." The government also answered that "implicit in the allegation of obscenity" is the claim that the publications are utterly without redeeming social value. The government stated that it "does not contend that each of the defendants knew that the materials charged in this indictment were, in fact, obscene." According to the government, the allegation of knowledge in the counts of the indictment called for "nothing more than knowledge on the part of each defendant as to the nature of the contents of the material received from the common carrier." With respect to the various terms contained in the indictment, the government answered that they were all intended to have the same meaning, to wit, "obscene" (A. 101-102).[2]

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[2] The government specifically conceded that the defendants in the case herein committed no acts which related to the distribution or exhibition of the publications involved to children or juveniles, nor did the government make any claim that the publications were distributed in such a way as to offend the sensibilities of an unwilling general public or to assault the privacy of any unwilling person (A. 69–Questions 16 and 17; A. 100–Answer VI). Nor is there any issue of "pandering" in the case herein. See, *Redrup v. New York*, 386 U.S. 767, 769.

Following the filing of the aforesaid objections, the matter came on for hearing before a Magistrate. The Magistrate ordered the government to amend its answers with respect to whether or not the publications exceeded contemporary community standards, appealed to prurient interest, and were utterly without social importance as aforestated. The government thereupon claimed that each of the publications substantially exceeded contemporary community standards in the nation as a whole in the depiction or representation of sex and nudity, but the government maintained its response that the publications appealed to "the prurient interest of the average person or to members of a clearly defined deviant sexual group"; that the materials in question were utterly without redeeming social value, but that the government was not required to answer any further with respect to the manner in which the publications were utterly without redeeming social value.

Thereafter, on the government's motion, the ruling of the Magistrate was reversed by the District Court, the court concluding that the government had furnished satisfactory answers in its amended answer (A. 214). The petitioners thereupon moved once again to dismiss the indictment upon all the grounds previously stated and upon the additional ground that insistence by the government that each of the publications could be measured either by appeal to the prurient interest of the average person or to some "deviant sexual group" rendered the statute involved, as construed and applied, unconstitutional in the light of the principles enunciated by the Supreme Court (A. 235-237). The motion was denied (A. 237).

There were additional motions made by petitioners including a motion for discovery and inspection; a motion for inspection of the Grand Jury minutes; a motion to strike the trial jury panel; and a motion to dismiss the indictment because of improper selection of the Grand Jury. All of the aforesaid pretrial motions made by the petitioners were denied by the District Court without opinion.

3. At the commencement of the trial, the government in its opening statement, stating to the jury, among other things, that the government would show that the individual defendants "knew the general nature and scope of the business" and "knew the general nature and scope of the four magazines in question" (A. 279), and that the purpose of establishing adult bookstores in the City of New Orleans was "to sell sexually oriented material" (A. 280). A motion by the petitioners was thereupon made to dismiss, based upon the government's opening statement, upon the ground that the proof which the government allegedly stated would be offered on the issue of *scienter* was not sufficient to establish an essential element of the offense (A. 311). The motion was denied (A. 311-312).

4. On the issue of the alleged obscenity of the publications, the government offered three witnesses. With respect to the element of "contemporary community standards relating to the depiction of sex and nudity in printed matter", the government offered the witness the Reverend Morton A. Hill, S.J. (A. 963, 980). The witness had been one of the three dissenting members of the eighteen-member Commission on Obscenity and Pornography (A. 974-976). His expertise was narrow and limited (A. 963-976). The witness had not read a novel in the last five

years (A. 982), nor had the witness seen any film condemned by the church. The witness agreed that he had no personal knowledge of the degree of sexual explicitness found in novels or films. The witness stated that, in his opinion, each of the publications involved in the four counts of the indictment exceeded contemporary community standards (A. 1033-1047), it being the view of the witness that no "television station" would have permitted the pictures in the publications to be shown (A. 1038-1042). Nevertheless the witness conceded that one of the two publications here involved, *Wild Sexual Compulsions,* seemed pseudo-scientific, contained a bibliography, and appeared to have been written by a professional person (A. 1089-1094). With respect to the magazine, "L'Affaire", the witness conceded that he had found a large number of publications similar to "L'Affaire" in all of the adult bookstores throughout the country that he had visited. The witness reiterated that his test for judging contemporary community standards would be what the community would tolerate in the representation of sex and nudity when "aired on television" (A. 1293).

On the issue of prurient interest, the government offered the witness Blaine E. McLaughlin, as "an expert in the field of psychiatry" (A. 1328, 1336). The testimony of the witness (A. 1415-1609) was of no aid to the government. The witness testified that the magazine "L'Affaire" would not appeal to the prurient interest of women at all and doubted that it would appeal even to the female homosexual. The witness also testified that the book, *Wild Sexual Compulsions,* would not appeal to the prurient interest of the average woman (A. 1693-1697). The witness stated that at least half of the average persons in the United States are women (A. 1672). The witness also conceded that, in addition to half of the

population to which the material would not appeal, the material might also not appeal to the prurient interest of a section of average male adults (A. 1675-1676). Finally, the witness stated that it followed logically from all of the above that the "publications do not appeal to the prurient interest of most people in this country" (A. 1700-1701).

To support its position that the publications were utterly without redeeming social value, the government offered a witness, John C. Greiner, "as an expert in the field of English Literature and also literary education" (A. 1792-1801). The principal expertise of the witness was in classical literature (A. 1793-1799). The witness stated that he had read modern literature some twenty years ago, but that his primary interest was in "16th Century Elizabethan" (A. 1819-1820). The witness was not shown the magazine, "L'Affaire". The witness testified that the book, *Wild Sexual Compulsions*, in his opinion had "no literary merit" (A. 1843-1860), but the witness agreed that the book had information in it and was "written properly for the average person, or so that the average person could read it and understand what was being written" (A. 1965).

The aforesaid was the government's case on the charged obscenity of the publications. The alleged proof of *scienter* on the part of petitioners is discussed hereafter, in Reasons for Granting the Writ. The government having rested its case, the petitioners moved for judgment of acquittal. The grounds in support of the motion were, first, that no sufficient evidence had been offered by the government to prove the essential elements of the offense charged in the indictment. It was urged that there was no proof establishing that the petitioner Thevis knew the character of the contents of the particular

publications specified in the indictment. It was also urged that there was no proof of any kind that the magazine, "L'Affaire", had been transported by common carrier, nor any evidence that the petitioner knew that the magazine, "L'Affaire", or the book, *Wild Sexual Compulsions*, were transported in a common carrier from New York and California, respectively. It was further argued that the government's witnesses had not only failed to prove the essential elements of the alleged obscenity of the material, but that, in fact, their own testimony had affirmatively shown that the material was not obscene. The motion for judgments of acquittal was denied.

5. The defense offered witnesses of undisputed expertise on the issue of non-obscenity of the publications.

The defense called Paul Bender (A. 2033), an Assistant Professor of Law at the University of Pennsylvania Law School (A. 2039). The witness graduated from Harvard Law School magna cum laude (A. 2034-2035), followed by clerkships with Judge Learned Hand and Justice Frankfurter (A. 2035-2036). Thereafter, the witness became assistant to the Solicitor General of the United States (A. 2041-2043). While in the office of the Solicitor General, the witness argued on behalf of the government, among other cases, the case of *Ginzburg v. United States*, 383 U.S. 463. While at the University of Pennsylvania, the witness taught courses on criminal law and constitutional law which included teaching about the law of obscenity (A. 2051). In 1968, the witness was appointed general counsel to the Commission on Obscenity and Pornography.

Dr. Robert B. Athanasiou (A. 2269) is an assistant professor in the faculty of arts and sciences of Johns Hopkins

University and is a psychologist. He is the holder of a Ph.D. degree in psychology from the University of Michigan. The witness supervises graduate students at Johns Hopkins and teaches them research methods in the general area of social psychology and the study of attitudes, values and behavior (A. 2278-2279). Dr. Athanasiou taught his first course in human sexuality at Johns Hopkins, using visual aids which dealt with sexuality in a very explicit way (A. 2279-2284). The witness has reviewed motion picture films for the Maryland Motion Picture Censorship Review Board and is a member of many professional associations in the psychological field (A. 2285-2290). The witness himself had engaged in an extensive study of the effects on persons of exposure to erotic material (A. 2291-2292). The witness was accepted by the court, as an expert in the fields of prurient interest and social value (A. 2297).

The defense called witness Joseph P. Rodriguez (A. 2412), a professional photographer employed by various television stations as a production technician, floor director, and lighting director. His expertise is in composition and lighting. He had been the recipient of a number of awards for his work as a photographer and was a member of a number of professional photography organizations (A. 2412-2423).

The defense called Dr. Cresaps Watson, the holder of a Ph.D. degree in literature, and a Professor of English at Louisiana State University (A. 2439-2440). The witness was accepted by the court as an expert on literary and educational value (A. 2464).

The defense called Dr. W. Cody Wilson, a social psychologist who received his Ph.D. in social psychology at Harvard University (A. 2611-2612). The witness taught at Harvard University, the University of Texas, the University of

California, Syracuse University and George Washington University (A. 2613-2614). Dr. Wilson also served as Director of Behavioral Sciences for the Advanced Research Project Agency in the Department of Defense in Washington (A. 2614-2616). In 1968, the witness was asked to join the Commission on Obscenity and Pornography as Executive Director of the Commission and as Director of Research (A. 2616).

The defense called Dr. Otto N. Larsen, Chairman of the Department of Sociology at the University of Washington (A. 2784-2785). The witness has published extensively in professional journals with particular interest in mass communication in public opinion. He is the author of a number of textbooks on sociology and the mass media (A. 2788-2791). At different times, the witness has been a consultant to the federal government in the area of mass media. He was a consultant to the Peace Corps; served with the State Department and the United States Information Agency; was consultant to the National Commission on the Causes and Prevention of Violence and then finally appointed by President Johnson to be a member of the Commission on Obscenity and Pornography (A. 2791-2792). His principal concern has been with the social impact of mass communication and therefore his research has encompassed motion pictures, newspapers, magazines and television (A. 2791-2795). The witness was accepted by the court as an expert on all three elements of obscenity (A. 2798, 2810).

Other witness included Kevin Arthur Sanders, an expert in the field of television and a reviewer of films and plays and who was accepted by the trial court as an expert with regard to entertainment (A. 2877-2903); Dr. Herbert Abelson,

associated with the public opinion and social research firm, Response Analysis Corporation, an organization which had conducted a survey on behalf of the Commission on *Obscenity and Pornography*, included in Volume 6 of the Technical Reports (A. 2926-2976); Dr. Richard Green, physician and psychiatrist, and an associate professor of psychiatry at the University of California School of Medicine at Los Angeles (A. 2998-3137); and Dr. Diane Sharon Fordney Settlage, assistant professor of obstetrics and gynecology at the University of Southern California and a physician licensed by the State of California (A. 3138-3172).

With respect to the book *Wild Sexual Compulsions*, the defense witnesses uniformly averred that the book had redeeming social value, did not appeal to the prurient interest of the average person and did not exceed contemporary community standards in the depiction or representation of sex or nudity. The pictures in the book were reasonably related to the text and illustrated the text; the publication was informative, had educational value, and was written in a manner so that the average person could have some understanding of what the problems are in human sexual behavior. The information contained in the book was reasonably accurate, and the work had positive social value, describing matters discussed commonly in the press and throughout society. The work presents a study of human behavior which is important for all persons to understand (A. 2159-2163, 2297-2298, 2341-2342, 2464-2492, 2704-2712, 2834-2836, 2903, 2969-2970, 2976, 3065-3137, 3167-3172).

With respect to the publication "L'Affaire," the witnesses testified that the material did not appeal to the prurient interest of the average person or to the average homosexual;

that the publication did not offend national standards nor go beyond customary limits of candor in the Nation as a whole in the description or representation of matter pertaining to sex or nudity. The magazine had social value because it communicated information about homosexuality, presenting the question of homosexuality in a reasonable light without approbation one way or the other. The magazine had photographic and artistic value. The presentation was tasteful in context and tried to communicate to people what homosexuality is about. The publication served the purpose of replacing rear and ignorance concerning the subject of homosexuality and some understanding (A. 2167-2175, 2373-2377, 2423-2424, 2713-2718, 2843-2845, 2902, 2969-2970, 2976, 3053-3065, 3163-3167).

6. Throughout the trial, the defense attempted to introduce into evidence material comparable to the publications named in the indictment herein. The petitioner offered to prove through his witnesses that comparable publications had been held to be not obscene and constitutionally protected by this Court and by other courts from which the government had never prosecuted an appeal. The petitioners offered to prove through their expert witnesses that these publications, to their knowledge, found reasonable acceptability in the community and were comparable in all respects to the publications involved in the indictment. All of such offers were rejected and in effect no comparable material offered by the petitioners were ever permitted into evidence nor were petitioners' expert witnesses permitted to comment on such comparable material. The evidence was sought to be offered by the petitioner to establish that the publications named in the indictment did not exceed contemporary community standards nor appeal to prurient interest and had social importance. They were also offered into evidence on the issue of *Scienter*.

7. Following the aforesaid testimony, the petitioners rested their case. The government simultaneously rested, offering no rebuttal evidence. A motion for judgment of acquittal on behalf of petitioners was then made, and the court reserved judgment on the motion. Discussions on proposed instructions then followed, followed by the instructions by the court to the jury. A discussion of the issues raised by the instructions and the failure to give petitioners' proposed instructions appears hereafter in Reasons for Granting the Writ. As heretofore stated, the jury returned a verdict of not guilty with respect to two other publications, and a verdict of guilty with respect to "L'Affaire" and *Wild Sexual Compulsions*. The motion for judgment of acquittal was thereafter renewed on behalf of the petitioners (A. 3383-3388) and decision was again reserved (A. 3393). The petitioners thereafter filed motions for a new trial, for judgments of acquittal, and in arrest of judgment. The motions were denied. Judgments of conviction were thereafter entered.

8.The Court of Appeals affirmed the judgment of conviction. In *United States v. Thevis and Peachtree News Company, Inc.*, 484 F.2d 1149, the court rejected the claim that the decisions of this Court on June 21, 1973 had rendered convictions returned under the *Memoirs* standards invalid. The court held that a judicial gloss could properly be placed by the Court of Appeals on the federal statute so as to include the specific sexual conduct suggested by *Miller*; that a national community standard was unnecessary in federal obscenity prosecutions, but that out of an abundance of caution, the court would consider the question of obscenity of material *vel non* under both the *Memoirs* and *Miller* standards.[3]

[3] Petitions for writ of certiorari are pending in this Court (*Thevis, et al. v. United States*, October Term 1973, No. 73-1075 and *Peachtree News Company, Inc.*, October Term 1973, No. 73-1091.

In *United States v. New Orleans Book Mart, Inc., Michael George Thevis, et al.*, 490 F.2d 73, decided on the same day as the case herein, the Court of Appeals reiterated that the federal obscenity statutes were not void for vagueness or overbreadth; that proof of *scienter* required only a general knowledge that material was sexually oriented; and that the material in that case, involving violation of 18 U.S.C. § 1465, was beyond the "legal parameters of obscenity" under both the *Memoirs* and *Miller* tests. The court again stated that judgments of conviction under the *Memoirs* standard could be upheld despite the conviction under a palpably vague, ambiguous, uncertain and unworkable "national standard". The court stated that, "We realize defendants were convicted in what may be called a no-man's land." 490 F.2d at 75.[4]

In the case herein, the Court of Appeals continued to adhere to the principles enunciated in the foregoing decisions (Appendix A). The court recognized that the conviction of petitioners in the case herein was obtained prior to the "Miller quintet." The court held that expert testimony was not required to uphold a determination that the material was obscene; that failure of the court to charge the jury as to the national standard for determining the alleged obscenity of the material was not error "in view of the newly enunciated community standard test"; that *scienter* was established by proof of knowledge that the material was sexually oriented; that the statute was neither unconstitutionally vague or overbroad; that it was not error to exclude comparable evidence offered by petitioners "if expert testimony is not

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[4] A petition for a writ of certiorari will be filed on or before June 3, 1974, in the said *Thevis and New Orleans Book Mart, Inc.* case.

required to determine obscenity"; that the indictment sufficiently advised petitioners of the charge against them; and that the two publications were "within the legal parameters of obscenity" under both the *Memoirs* and *Miller* tests.

REASONS FOR GRANTING THE WRIT.

1. In the discussion which follows hereafter, the petitioners demonstrate the unconstitutionality of the federal obscenity statute here involved on its face and as construed and applied to petitioners. Initially, however, the petitioners submit that it may be unnecessary for this Court to reach the constitutional issue. This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws are enforced by fair proceedings. The petitioners invoke this supervisory jurisdiction in the case herein. As was stated in *McNabb v. United States*, 318 U.S. 332, 340-341:

> "...the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force... Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts."

See also, *Saldana v. United States*, 365 U.S. 646, 647 (sentence "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts"); *Elkins v. United States*, 364 U.S. 206, 216 (silver platter doctrine abandoned upon invocation of "the Court's supervisory power over the administration of criminal justice in the federal courts"); *Marshall v. United States*, 360 U.S. 310, 313 (exposure of jurors during trial to newspaper articles entitles accused to a new trial "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts"); *Yates v. United States*, 356 U.S. 363, 366-367 (sentence of district court in contempt action set aside in the exercise of the Supreme Court's "supervisory power over the administration of justice in the lower federal courts"); *Grunewald v. United States*, 353 U.S. 391, 423-424 (danger that jury might make impermissible use of an alleged prior inconsistent statement admitted into evidence on the question of credibility justifies grant of a new trial under "our supervisory power over the administration of federal criminal justice").

Prior to trial the petitioners here moved to dismiss the indictment on the ground that the indictment failed to state facts sufficient to constitute an offense, because it failed to allege the essential elements of "obscenity" and because the statute on its face was vague, uncertain, ambiguous and overbroad. When petitioners requested a bill of particulars the government stated in effect that the allegation of obscenity in the indictment meant that the publications here "go substantially beyond customary limits of candor in the Nation as a whole"; that the publications appealed to "the prurient interest of the average person or to a member of a deviant

sexual group"; and that the publications "are utterly without redeeming social value." The government stated that all of the terms used in the indictment were "intended to have the same meaning, to wit: 'obscene'. See: *Manual Enterprises v. Day*, 370 U.S. 478, 483, 484, n.5 (1962)" (A. 101-102).

The trial court instructed the jury that it was required to determine whether the publications were patently offensive because they affront "contemporary community standards in the Nation as a whole relating to the description or representation of sexual matters" (A. 3318-3319, 3323-3325, 3329). The jury was also advised that it must decide if the predominant appeal of each book was to the prurient interest of the average person in the Nation as a whole (A. 3321), and with respect to the publication "L'Affaire," the jury was instructed that it was to determine whether or not the publication appealed to the prurient interest in sex of homosexuals in the Nation as a whole (A. 3323). The jury was also instructed that it must determine whether the publications were utterly without redeeming social value (A. 3319). When the jury requested a re-reading of the court's instructions, the trial court again advised the jury that it must apply national standards in determining whether the publications appealed to prurient interest and in determining whether they were offensive. The jury was also again instructed that it was required to find the publications to be utterly without redeeming social value (A. 3353-3372).

On petitioners' motion in arrest of judgment, petitioners again alleged that the indictment failed to state facts sufficient to constitute an offense because it failed to allege the essential elements of obscenity and that the statute under which the indictment was brought was, on its face, vague,

uncertain and ambiguous. Moreover, on the motion in arrest of judgment, petitioners offered to prove through evidence from expert witnesses that the federal obscenity statute on its face and as construed and applied was vague, uncertain, ambiguous and overbroad and failed to provide meaningful guides for juries, judges or those subject to its provisions.

On June 21, 1973, this Court rendered its decision in *Miller v. California* and the other related decisions. In *Miller v. California,* 413 U.S. 15, this Court noted that since the decision in *Roth,* no majority of the Court had at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the State's police power. The Court stated that "...we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment" (413 U.S. at 19-20).

Before enunciating the standards for judging obscenity, the Court unanimously rejected the *Memoirs* test. "The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra.* But now the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation." (413 U.S. at 23).The opinion of the Chief Justice noted the observation by Justice Harlan that "utterly without redeeming social value" did not seem to have "any meaning at all." Moreover, stated the majority opinion: "We do not adopt as a *constitutional standard* the 'utterly without redeeming social value' test of *Memoirs v. Massachusetts." (413 U.S. at 24).*

Further, it was emphasized, "We also reject *as a constitutional standard,* the *ambiguous concepts* of 'social importance'," (413 U.S. at 25, n.7) (Emphasis added). Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. at 73, to which the Chief Justice pointed in *Miller,* agreed that the Court had "failed to formulate a standard that sharply distinguishes protected from unprotected speech" (413 U.S. at 83), and that none of the differing formulas enunciated by the individual Justices in the past could "reduce the vagueness to a tolerable level" (413 U.S. at 84). As a result of "our failure to define standards with predictable application," the past had been marked by a "lack of fair notice" and a "chill on protected expression" (413 U.S. at 93). And Mr. Justice Douglas added in his dissenting opinion in *Miller:* "The Court has worked hard to define obscenity and concededly has failed." (413 U.S. at 37).

Another prong of the tripartite test of *Memoirs* which this Court found constitutionally infirm was the "national community" standard. This Court described such standard as "unrealistic" and "an exercise in futility." A national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable" and "neither realistic nor constitutionally sound" (413 U.S. at 31-32).

Moreover, this Court emphasized in *Miller:*

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . .As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed . . .The basic guidelines for the trier of facts

> must be: . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion . . . Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (413 U.S. at 23-27).

As indicated by the decisions of this Court, the principles governing the fairness of trial procedures in federal courts has not been restricted to those emanating solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has on numerous occasions formulated rules guided by considerations of justice not limited to the strict language of the Constitution, but rather to the postulates which underlie the fundamental law. In the case herein, the indictment returned against petitioner by the Grand Jury gave no indication of the nature and cause of the accusation made against petitioner, and it is now clear from the decisions of this Court on June 21, 1973, that the standards used by the Grand Jury in the return of this indictment were incapable of objective measurement. The case was tried under standards and principles which were concededly vague, ambiguous, uncertain and unworkable. The applicable law which was given to the jury has been termed by this Court to be in

essence only an exercise in futility. The judgment of conviction rests upon standards and criteria which the highest court in the land has held to be uncertain, unpredictable, indefinite, unreliable, confused and baffling.

Moreover, the unfairness of the trial proceedings against petitioners have been compounded by the rulings of the court below. Clearly, the federal statute at the time when the alleged offenses occurred and during the entire trial proceedings, failed to proscribe any specific sexual conduct. Concededly, no authoritative construction by this Court had ever included such specifically defined sexual conduct. Yet the appellate court in the case herein has merely placed a judicial gloss upon the statute in order to affirm the judgment of conviction. Whether this be deemed an act of judicial legislation or a retroactive construction which offends the *ex post facto* provisions of the Constitution, it is in any event clearly unfair and unjust to affirm the judgment of conviction here upon such a basis.

Moreover, although the case was clearly tried under the theory that a national standard applied, the court below has affirmed the judgment of conviction on the theory that some standard other than a national standard was proper. Yet the jury which heard the case against petitioners were never instructed to determine the issues on any other basis than a national standard and the case was never tried by the government or by the defense on any other theory.

Finally, the court below purporting to give the petitioners here the "benefits" of both the *Memoirs* and *Miller* tests, has in fact deprived petitioners of the very benefits the court below purports to grant. The court below has found the two

publications here to be obscene under *Memoirs* and *Miller*. But the publications were never fairly adjudicated to be obscene under the *Memoirs* test because this Court has rejected such test as completely unworkable. Under the *Miller* test, a publication is not obscene if such publication does not lack serious literary, artistic, political or scientific value. That issue was never decided by the jury in petitioners' case and the petitioners have been denied their right to a jury when an appellant court purports to decide a question which should have initially been submitted to a jury.

Moreover, the prosecution of the petitioners here took place before the decisions of this Court on June 21, 1973. They have been "caught in a period of transition." *United States v. Palladino*, 490 F.2d 499, 500 (1 Cir. 1974). They were "convicted in what may be called a no man's land." *United States v. New Orleans Book Mart, Inc., et al.*, 490 F.2d 73, 75 (5 Cir. 1974). See also, *United States v. Friedman, et al.*, 488 F.2d 1141 (10 Cir. 1974); *United States v. Henson*, unreported (9 Cir. No. 73-2063, October 5, 1973), a copy of the *Henson* opinion appearing in the petition for writ of certiorari in *Thevis and Peachtree News Co., Inc.*, October Term, 1973, No. 73-1075, as Appendix "E".

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party v. S.A.C.B.*, 351 U.S. 115, 124.

See also, *Mesarosh v. United States*, 352 U.S. 1, 14.

2. The petitioners continue to assert that a prior trial under the federal obscenity statute, conducted, as this case was, under the standards for judging obscenity promulgated in *Memoirs*, resulted in a judgment of conviction which is constitutionally impermissible. Some aspects of this constitutional issue were briefed and argued before this Court in *Hamling, et al v. United States*, October Term, 1973, No. 73-507 filed by petitioner in *Peachtree News Co., Inc. v. United States*, October Term, 1973.

In brief, 18 U.S.C. § 1462 is not on its face limited to any specifically defined sexual conduct. The trial court's instructions to the jury defining "obscenity" were restricted to the three-part *Memoirs* test. Neither the statute on its face nor as construed and applied by the court's instructions was confined to specifically defined depictions or representations of sexual conduct. At no time prior to June 21, 1973, had this Court or any other federal court had occasion to authoritatively construe the federal obscenity statute to limit its reach to specifically defined sexual conduct, and in *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, fn. 7, this Court only stated that it was "prepared" to construe the vague terms "obscene, lewd, lascivious, filthy," in accordance with *Miller*. The court below has acted on the assumption that "the definition of Miller is a gloss properly added to § 1462." *United States v. Thevis*, 484 F.2d 1149, 1155. Such a ruling which reads provisions into a law which were not present at the time the offense allegedly was committed, or when the indictment was returned or when the case was tried, constitutes a sheer deprivation of liberty without due process of law (*Rabe v. Washington*, 405 U.S. 313; *Cole v. Arkansas*, 333 U.S. 196; *De Jonge v. Oregon*, 299 U.S. 353), an act of

judicial legislation (*United States v. Robel*, 389 U.S. 258), and a retroactive judicial construction barred by the *ex post facto* and due process provisions of the United States Constitution.

The jury in the case herein was required to measure the alleged obscenity of the publications by "national community standards," a national standard which this Court has termed "hypothetical," "unascertainable," "abstract," "unrealistic" and "an exercise in futility." Standards which are hypothetical, abstract and unascertainable are precisely the standards which this Court has uniformly condemned as violative of the free speech and due process provisions of the Constitution. These are the kind of standards that may trap the innocent by not providing fair warning, and the kind of standards which sweep within their ambit speech and press ordinarily entitled to constitutional protection. These are also the standards which permit arbitrary and discriminatory enforcement, and which delegate basic societal policy matters to police officers, judges and juries for resolution on an *ad hoc* and subjective basis. See, *Grayned v. City of Rockford*, 408 U.S. 104, 108-109; *Smith v. Goguen*, 94 S.Ct. 1242; *Lewis v. New Orleans*, 94 S.Ct. 970; *Plummer v. City of Columbus*, 94 S.Ct. 17; *Gooding v. Wilson*, 405 U.S. 518; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

The Court of Appeals below has not controverted the allegation made by petitioners that the "national community standard" under which the judgment of conviction herein was rendered is an obviously vague, ambiguous, uncertain and overbroad standard in the light of the decisions of this Court on June 21, 1973. The court is content to simply uphold the judgment of conviction in the light of the "newly enunciated community standard test." It is not entirely clear as to what

that standard is, but it is obviously plain that such a standard was not in existence during the entire trial proceedings and was never given to the jury in the case herein. There is, here again, it is submitted, the same failure of due process notice, the same type of retroactive judicial construction and legislation.

With respect to the element of social value and importance, this Court unanimously agreed that the concepts of "social value" and "importance" are constitutionally ambiguous and "unworkable" and, indeed, virtually without any meaning at all. Thus, the jury was permitted, under the federal obscenity statute as construed and applied by the trial court, to exercise their individual whims and prejudices as to what each of the jurors deemed socially desirable.

Finally, in this connection, petitioners urge again that the vagueness, ambiguity and unworkability of the standards for judging obscenity are exemplified by the candid expression of this Court that under the *Roth-Memoirs* test, the Court

> "was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment . . . The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States subjectively judging each piece of material brought before us." 413 U.S. at 22.

Where Justices of the Supreme Court are compelled to "subjectively" judge each publication brought before them because of the vagueness and unworkability of the standards which the Court itself has enunciated, and which has lead to

divergent and contradictory views by members of the Court, it appears constitutionally impermissible to uphold a judgment of conviction which has been rendered under such incomprehensible criteria.

3. The indictment herein is unconstitutionally null and void, failing as it does to inform petitioners of the nature and cause of the accusation against them. The trial court was without jurisdiction to try a cause under an indictment returned by a Grand Jury which acted under standards and criteria held vague, ambiguous and unworkable by the highest court of the land. The indictment tracked only the language of the statute, and in the light of the vagueness, ambiguity and overbreadth of the statute as declared by this Court, the petitioners were deprived not only of the rights guaranteed by the Sixth Amendment, but they were denied any of the effective protections which the judicial process is ordinarily required to afford an accused. There can be no procedural due process under vague and ambiguous standards and criteria because the indictment, the trial and the verdict supposedly rendered on evidence is of little significance when the jury is free to apply its own standard of what constitutes unlawful conduct under the law. Such vague standards hamper judicial review because it is impossible to identify the factors relied on in reaching the conclusion in the trial court when the governing statute which provides the basis for prosecution is uncertain and incapable of objective measurement. Prejudiced and discriminatory exercise of individual predilections may be concealed behind the verdict of the jury. Vague and ambiguous provisions in a statute constitute a surrender of lawmaking by a legislature to a court and jury. Thus, the process of lawmaking is turned improperly into case-by-case adjudication in the courts.

The Court of Appeals below held that the indictment here which is merely in the language of the statute is sufficient. The court opined that the term "obscene" as used in the statute "is a legal term of art, not merely a generic or descriptive term," and, added the court, the term has been the subject of much explication in the opinions of this Court, particularly "in *Roth* and *Memoirs.*" 484 F.2d at 1152. See, Appendix "A" herein. But the statute herein does not define specific sexual conduct to whose depiction or description it applies. It does not contain the specifics required by *Miller.* The "national community standard" test and the "utterly without redeeming social value or importance" test which was the "explication" in existence at the time the indictment was returned, were condemned by this Court as completely unworkable, vague, ambiguous, uncertain, unconstitutional and completely unacceptable.

The indictment herein which merely repeats the language of the unconstitutionally vague and ambiguous statute is insufficient. The indictment omits essential elements of the offense and does violence to the provisions of the Fifth and Sixth Amendments. The petitioners here have been deprived of the right to be informed of the nature and cause of the accusation against him and the right to be free from accusation except by indictment of a grand jury under appropriate constitutional and legal standards and criteria. See, *Russell v. United States,* 369 U.S. 749; *United States v. Vuitch,* 402 U.S. 62; *Rabe v. Washington,* 405 U.S. 313; *Cole v. Arkansas,* 333 U.S. 196; *De Jonge v. Oregon,* 299 U.S. 353. See also, *Smith v. Goguen,* 94 S.Ct. 1242; *Gooding v. Wilson,* 405 U.S. 518; *Papachristou v. City of Jacksonville,* 405 U.S. 156.

4. Over objection, the trial court instructed the jury that the sole issue before them on the question of *scienter* was whether the government had proved beyond a reasonable doubt that the petitioners had "knowledge of the character of the contents of the publications at the time they caused them to be brought to Louisiana and received them in this State." (A. 333). As heretofore stated, the Court ruled out of the case any requirement of proof of knowledge on the part of the petitioner Van Gundy that the material exceeded contemporary community standards or appealed to prurient interest or was utterly without social importance. The Court also ruled out of the case a defense of honest ignorance of the alleged obscenity of the material. The trial court refused the petitioners' proposed instructions on these issues. The word "character" was never further defined by the trial court.

The question of the standards for judging *scienter* in federal obscenity prosecutions was briefed and argued in *Hamling, et al v. United States,* October Term 1973, No. 73-507.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "contents" of the material is to impose the absolute criminal liability condemned by this Court in *Smith v. California.* Sex and obscenity are not the same, and knowledge of the "contents" of a publication dealing with sex cannot be the equivalent of knowledge of the obscenity of the publication. Mere proof that a publisher or distributor knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such publisher or distributor knew the material was obscene.

It follows, therefore, that mere proof of "knowledge of contents" cannot be the standard for judging *scienter*, since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury would be left free to presume guilty knowledge under the federal obscenity statute by its own subjective predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in ciminal prosecutions, particularly involving speech and press. *Bailey v. Alabama*, 219 U.S. 219; *Tot v. United States*, 319 U.S. 463; *Speiser v. Randall*, 357 U.S. 513. Such an arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material. *Smith v. California*, 361 U.S. 147; *New York Times Co. v. Sullivan*, 376 U.S. 254.

If an accused may be convicted without any proof that he knew that the material was obscene, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to prevent evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury become meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms.

5. Moreover, the government failed to prove *scienter* on the part of petitioner Van Gundy here, even under the theory which the government advanced and which was adopted by the trial court in its instructions to the jury. There is no competent proof in the record here that petitioner knew the contents of the two specific publications upon which the judgment of conviction rests.

Petitioner Van Gundy submits that there is no competent evidence in the record to establish that the petitioner knew the character of the contents of the magazine "L'Affaire" or the book "Wild Sexual Compulsions." There is no evidence that the petitioner Van Gundy knew that each of the publications was brought into New Orleans by means of a common carrier from the State of New York and the State of California, respectively. Indeed, there is no evidence in the record that the magazine was even transported into the State by common carrier since the only evidence is that the magazine was purchased in New Orleans at a bookstore. Nor is there any evidence in the record that the petitioner Van Gundy aided and abetted the commission of any such alleged offense. The crime of aiding and abetting is one that requires a "specific intent." Mere association, as opposed to participation, is not sufficient to establish guilt. See, *United States v. Hill*, 464 F.2d 1287 (8 Cir. 1972); *United States v. Rodgers*, 419 F.2d 1315 (10 Cir. 1970). There is, in short, no evidence of guilty knowledge in the case herein even under the erroneous theory which the case was tried.

Competent evidence means evidence that a jury in reason can accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt. A scintilla of evidence is not sufficient; even a preponderance of

evidence is not sufficient. The proof of guilty knowledge must be proof beyond a reasonable doubt, such proof as is clear, convincing and unequivocal. *In re Winship,* 397 U.S. 358; *Cool v. United States,* 93 S.Ct. 354; *United States v. Jiminez-Serrato,* 451 F.2d 523, 525 (5 Cir. 1971).

The government, it is submitted, failed to establish the essential element of the offense of *scienter* on its own theory of the case. Concededly, there was no proof that petitioner Van Gundy was in any manner aware of the alleged obscene nature or character of the publications.

6. The petitioners submit that the government failed to establish by any competent evidence that each of the two publications substantially exceeded contemporary community standards in the Nation as a whole in the depiction or representation of sex or nudity, or appealed to prurient interest or were utterly without social value and importance. The uncontradicted record establishes overwhelmingly that the publications here involved did not exceed contemporary community standards in the Nation as a whole or appeal to prurient interest or were utterly without social importance or value In the constitutional sense, the publications are not obscene and are entitled to constitutional protection as a matter of law.

At the time when the case herein was tried, the government was required to establish by substantial evidence and beyond a reasonable doubt that the material was patently offensive because it affronted contemporary community standards in the Nation as a whole; that to the average person in the Nation the dominant theme of the material, taken as a whole, appealed to a prurient interest; *i.e.*, a shameful or

morbid interest in sex; and that the matter was utterly without redeeming social value. *Memoirs v. Massachusetts*, 383 U.S. 413.

On the issue of contemporary community standards, the expertise of Father Hill was not established. The background of the witness was primarily theological. Moreover, the conclusion that the publications exceeded contemporary community standards was not based on facts but merely measured by whether or not the material could be shown "on television." In addition, the witness affirmed that he had seen in many bookstores throughout the country material substantially identical to the publications here involved. The testimony of the government's "expert witness" on "prurient interest" was self-defeating. The witness conceded that the publications named in the indictment did not appeal to the prurient interest of "most people in the country." Moreover, the witness was permitted to testify that the magazine "L'Affaire" appealed to the prurient interest of some homosexuals although the indictment made no charge of dissemination of the publication to an alleged deviant sexual group. There was no proof that the publication was "designed for" and "primarily disseminated" to a clearly defined deviant sexual group rather than the public at large. *Mishkin v. New York*, 383 U.S. at 508. The witness offered by the government with respect to the issue of "social value" conceded that the publications were written properly for the average person so that the average person could read and understand what was being written. On the witness's own terms, therefore, the material did have social value.

As the Statement of the Case makes clear, the petitioners presented expert witnesses on each element in issue. The

expertise of these witnesses could not be disputed. Their background and credentials were impeccable. The witnesses established overwhelmingly that the publications involved herein had social value and importance; each testified that the material did not appeal to a prurient interest and did not substantially exceed contemporary community standards.

Thus, the entire record presents an indisputable case on the non-obscenity of the publications here involved. It is not appropriate for the government to argue now that there was no necessity on its part to offer any expert evidence. This case was tried on the correct assumption by the government at the time that expert evidence was required, and the fact is that the evidence presented by the government in actuality established that the material was not obscene. Petitioners submit that the record in the case herein is barren of any competent proof to establish the alleged obscenity of the material, and that on the contrary, the record overwhelmingly establishes that the material is not obscene and that the jury verdict could only have been based on subjective predilections.

7. As a matter of law the publications herein are entitled to constitutional protection. Each of the publications is not utterly without redeeming social value or importance and these publications have serious literary, artistic and scientific value. The publications are similar to and in no way significantly different from publications which were held to be entitled to constitutional protection by this Court. *Weiner v. California*, 404 U.S. 988; *Burgin v. South Carolina*, 404 U.S. 806; *Pinkus v. Pitchess*, 429 F.2d 416 (9 Cir. 190), affirmed sub nom. *California v. Pinkus*, 400 U.S. 922.

8. The exclusion of constitutionally relevant evidence deprived the petitioners of a fair hearing and fair trial, an opportunity to be heard and to defend against the charges contained in the indictment, with resultant deprivation of petitioners' liberty contrary to the free speech and press, due process and fair trial provisions of the First, Fifth and Sixth Amendments. As the Statement of the Case demonstrates, the trial court excluded an entire category of oral and documentary evidence offered by the petitioners which bore importantly on the issues of contemporary community standards, prurient interest and social importance, as well as issues of guilty knowledge and intent. Comparable material openly published, widely distributed, and generally accepted by the community, and comparable material which has been held to be constitutionally protected by this Court and other courts, were excluded entirely from the jury's consideration.

Thus, the jury was erroneously permitted to conclude that the two publications herein involved exceeded contemporary community standards, appealed to prurient interest, and were utterly without social importance, without ever being permitted to receive evidence as to comparable explicit sexual material which the community tolerates and which in many cases has been held to be constitutionally protected by the courts of the land, including the highest court. This probably explains the inconsistent verdicts reached by the jury, returning as it did a verdict of not guilty on two of the publications and guilty on two others. Yet, both the prosecution's witnesses and the petitioners' witnesses had all agreed that under the tripartite standard for judging obscenity, there was no legally significant difference among all the publications. Had the jury been permitted to see the sexually explicit material which this Court and other courts

have approved, and which is generally accepted and tolerated in the community, the jury would not have been left to vote their own subjective predilections with respect to the publications involved. The government was permitted to assert that it had proved its case with respect to obscenity and willfullness by producing the publications named in the indictment, supported by its "expert" witnesses, but the petitioners were not permitted to introduce evidence which would have established that the publications were not obscene and the absence of guilty knowledge and intent.

The Court of Appeals below dismissed petitioners' argument on this issue by the following statement: "If expert testimony is not required to determine obscenity, it is certainly within the trial judge's discretion not to allow comparable evidence." (Appendix "A"). This conclusion is, it is submitted, unsupportable in law or in logic. It is true that in *Paris Adult Theatre I*, this Court held that there was no constitutional need for "expert" testimony on behalf of the prosecution, but in *Kaplan v. California*, this Court also stated that the defense should be free to introduce appropriate expert testimony. This Court therefore did not exclude expert testimony under all circumstances. Moreover, if an accused in an obscenity prosecution can offer expert evidence on his behalf, it would appear to follow logically that he can also offer competent comparable evidence on his behalf. It is not consistent with due process of law to exclude an entire category of testimony offered by an accused merely because the accused had the opportunity to offer other competent evidence in his behalf.

All evidence that is rationally probative is admissible, unless excluded by some rule or principle of law. The trial of

a criminal action lies in the evidence, and to refuse admission of competent evidence is to refuse to hear the cause. Moreover, the relevancy or probative value of evidence with respect to any issue is to be sharply distinguished from the weight of the proof. If the evidence is worthy of consideration by the jury, "it is for the jury to give it the appropriate weight in effecting persuasion." 1 Wigmore, Evidence §29 (3d Ed. 1940).

The trial court also denied all efforts by petitioners to demonstrate, factually, that the provisions of the federal obscenity statute are vague, uncertain and overbroad, and therefore violative of the free speech and press, due process, and equal protection provisions of the Constitution. Where legislative action is challenged, and the basis for such action is predicated on particular factual premises and conclusions, these facts are properly the subject of evidence and findings. It was error to deny the petitioner an evidentiary hearing where appropriate empirical evidence could be offered to demonstrate, in fact, the unconstitutionality of the statute. *Borden's Farm Products Co., Inc. v. Baldwin,* 392 U.S. 194, 209-213; *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-549.

There is substantial conflict between the Circuit Courts of Appeal in connection with the application of *Miller* standards to conduct occurring prior to the date of that decision, and for this reason certiorari should be granted.

IN THE FIRST CIRCUIT:

U.S.A. v. Palladino, et al., No. 72-1005 (1-6-74)

> The conviction under the *Roth-Memoirs* standards was held improper for conduct occurring prior to

June 21, 1973. Remanded for new trial under *Miller* and *Roth-Memoirs*, applying a national standard of decency.

United States v. One Reel of Film, 481 F.2d 206 (7-16-73)

19 U.S.C. § 1305(a) was held constitutional on its face. Movie was obscene by both standards, *Roth-Memoirs* and *Miller*, and national standard possibly applies in Federal obscenity cases. Petition for Certiorari now pending before United States Supreme Court.

IN THE FOURTH CIRCUIT:

United States v. Brown, _____ F.2d _____ (9-18-73)

This case was vacated and remanded to the Fourth Circuit for reconsideration in light of the *Miller* series of cases. Without allowing counsel any rebriefing or argument, the Circuit Court again affirmed the judgment of conviction without opinion. Petition for Certiorari now pending before the United States Supreme Court.

IN THE FIFTH CIRCUIT:

United States v. Thevis, et al., 484 F.2d 1149 (9-12-73)

Both *Roth-Memoirs* and *Miller* standards held to be applied and appellant was given benefit of most liberal viewpoint (this approach avoided ruling on *ex post facto* argument), although

arguing in *Cote v. U.S.A.*, 485 F.2d 574 (9-11-73), footnote 3, that "...with the announcement of *Miller* and the companion cases of the same date, the Court's '*performance*' has taken a significant new turn..." Petition for Certiorari now pending before United States Supreme Court. The Solicitor General requested a month's additional time within which to respond to this application and the same was granted by the Court until March 30, 1974. As of the date of this writing, the Solicitor General still has not filed a response.

See also:

United States v. Thevis, 490 F.2d 76 (2-19-74)

United States v. New Orleans Book Mart, et al., 490 F.2d 73 (2-19-74)

United States v. Sulaiman, et al., 490 F.2d 78 (2-19-74)

United States v. Groner et al., No. 71-1091 (5-24-74)

IN THE SEVENTH CIRCUIT:

United States v. Sians, _____ F.2d _____ (7-5-73)

In a case briefed and argued before *Miller*, June 21, 1973, but decided on memorandum order of 7-5-73, the Court affirmed the conviction applying *Miller* standards to pre-*Miller* conduct. Petition for Certiorari now pending before United States Supreme Court.

IN THE NINTH CIRCUIT:

U.S.A. v. Hamling, et al., 481 F.2d 307 (6-7-73)

Pre-*Miller* ruling issued June 7, 1973 and challenged by counsel on Petition for Rehearing raising arguments herein was affirmed by a denial of the petition without comment on August 23, 1973. Certiorari granted by this Court. Argument April 15, 1974. decision pending.

U.S.A. v. Henson, et al., ____ F.2d ____ (10-5-73)

Appellant's pre-*Miller* conduct governed by *Roth-Memoirs* standards. Said standards are unconstitutionally vague, conviction reversed. Pending hearing *en banc.*

TENTH CIRCUIT:

U.S.A. v. Friedman, 488 F.2d 1141 (12-11-73)

Reversed and remanded to District Court to re-examine facts and determine standards to be applied in any new trial, as well as a determination of applicable community standard. Petition for Rehearing denied.

U.S.A. v. Ewing, 491 F.2d 714 (2-4-74)

U.S.A. v. Harding, 491 F.2d 697 (1-28-74)

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT EUGENE SMITH,
Attorney for Petitioners,

GARY VAN GUNDY,
Rivergate News Agency, Inc.

GILBERT H. DEITCH,
Of Counsel.

APPENDIX A.

Opinion and Judgment of the Court of Appeals.

United States of America, Plaintiff-Appellee, v. Michael G. Thevis, Gary Van Gundy and Rivergate News Agency, Inc., Defendants-Appellants. No. 72-2664. United States Court of Appeals, Fifth Circuit. Feb. 19, 1974.

Before TUTTLE, GEWIN and RONEY, Circuit Judges.

PER CURIAM:

This obscenity case, in conjunction with two others being decided today by this panel,[1] arises from convictions obtained prior to the "*Miller* quintet" and our recent decisions in light thereof.[2] The appeals were held pending the Supreme Court's disposition of *Miller*. Virtually every point made on this appeal is now controlled by these recent decisions adversely to appellants. We affirm.

Thevis, Van Gundy, and The Rivergate News Agency, Inc. were convicted for using a common carrier for interstate transportation of obscene material in violation of 18 U.S.C.A. § 1462.

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[1] United States v. New Orleans Book Mart, 490 F.2d 73 (5th Cir. 1974) [No. 71-2594]; United States v. Sulaiman, 490 F.2d 78 (5th Cir. 1974) [No. 71-3145].

[2] Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973): United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d. 500 (1973); United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States v. Millican, 487 F.2d 331 (5th Cir. 1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

(1) Expert testimony is not required to uphold a determination that the transported material is obscene. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), citing with approval United States v. Groner, 479 F.2d 577 (5th Cir. 1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

(2) Failure of the court to charge the jury specifically as to the national standard for determining the obscenity of the material was not error in view of the newly enunciated community standard test. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States v. 12 200-Ft. Reels, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

(3) Scienter by the defendants that the transported materials are legally obscene is not required for conviction under 18 U.S.C.A. § 1462. Defendants' knowledge of the materials' sexual orientation is sufficient. United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

(4) Title 18 U.S.C.A. § 1462 is neither unconstitutionally vague or overbroad. United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1149 (1957); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

In addition to urging the non-workability of a national standard in conjunction with the *ex post facto* effect of applying the *Miller* standards to this case, an argument which we answered adversely to defendants today in United States v. New Orleans Book Mart, 490 F.2d 73 (5th Cir. 1974) [No. 71-2594], they contend it was error for the trial judge to

disallow comparable evidence. If expert testimony is not required to determine obscenity, it is certainly within the trial judge's discretion not to allow comparable evidence.

The defendants also urge that due to the inherent vagueness of a national obscenity standard as discussed in *Miller,* 413 U.S. at 20, the indictment, by tracking 18 U.S.C.A. § 1462, did not sufficiently advise them of the charge against them. This contention, however, was answered adversely to them in United States v. Thevis, 484 F.2d 1149, 1152 (5th Cir. 1973).

Following *Thevis,* we have reviewed "L'Affaire, No. 7," and "Wild Sexual Compulsions" under both the Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and the *Miller* tests and find them to be within the legal parameters of obscenity.

Affirmed.

APPENDIX B.

Order Denying Rehearing.

United States Court of Appeals
Fifth Circuit
Office of the Clerk
April 3, 1974

TO ALL COUNSEL OF RECORD

Re: No. 72-2664 – U.S.A. v. Michael G. Thevis, et al.

Gentlemen:

This is to advise that orders have this day been entered denying the petition for rehearing on behalf of Michael G. Thevis and the petition for rehearing on behalf of Gary Van Gundy and Rivergate News Agency, Inc. No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petitions for rehearing en banc have also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
/s/ By Susan LeBrun
Deputy Clerk

/sbl
cc: Mr. Michael Silvers
Mr. Ronald Tanet
Mr. Robert Eugene Smith
Mr. Stanley Fleishman
Mr. Michael H. Ellis &
Ms. Mary Williams Cazalas

APPENDIX C.

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . ."

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The pertinent provisions of Article I, §9 are:

"* * * No . . . ex post facto Law shall be passed. * * *"

6. The pertinent provisions of 18 U.S.C. § 1462 are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce –

(a) an obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or * * *

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful –

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (June 25, 1948, c.645, 62 Stat. 768; May 27, 1950, c.214, §1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85-796, §2, 72 Stat. 962.)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1823

GARY VAN GUNDY AND RIVERGATE NEWS AGENCY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners raise contentions identical to those decided in *Hamling* v. *United States,* No. 73-507, decided June 24, 1974. They contend (1) that their convictions must be reversed because they were tried under the *Roth-Memoirs* standards, which, they claim, this Court found impermissibly vague in its subsequent decision in *Miller* v. *California;* (2) that the indictment was insufficient; (3) that *scienter* was not established; (4) that the court excluded relevant evidence; and (5) that the application of both *Memoirs* and *Miller* standards by the court of appeals was a violation of *ex post facto* principles.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted on two counts of receiving obscene material which had been shipped by common carrier in interstate

commerce, in violation of 18 U.S.C. 1462.[1] Petitioner Van Gundy was sentenced to two concurrent terms of eighteen months' imprisonment. Petitioner Rivergate News Agency, Inc. was fined $5,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A; 490 F. 2d 76).

On July 9, 1971, Red Ball Motor Freight, Inc. delivered 69 cartons of books, including the book "Wild Sexual Compulsions," to Rivergate News Agency in New Orleans, Louisiana. The books had been shipped from Los Angeles, California and were accepted at Rivergate News Agency by petitioner Van Gundy, the operator of Rivergate. A magazine entitled "L'Affaire No. 7" had been similarly shipped to Rivergate News Agency from New York in June, 1971.

1. Petitioners' contention that their conviction must be reversed because they were convicted under standards applicable prior to this Court's decision in *Miller* v. *California,* 413 U.S. 15, is without merit. As this Court ruled in *Hamling, supra,* slip op. at 12, petitioners should and did receive any benefits available to them from the *Miller* cases.

(a) The trial court instructed the jury to apply national standards of obscenity. Although the Court in *Hamling* held that jurors in federal obsenity cases should be permitted to draw on the standards of their own community, the Court further held that occasional references to the "country as a whole" in the trial court's instruction dealing with community standards did not materially affect the deliberations of the jury. *Hamling, supra,* slip op. at 12-20. Likewise the instruction here was not prejudicial error.

[1]Co-defendant Thevis was also convicted. His petition for a writ of certiorari, No. 73-1796, was dismissed by stipulation, August 16, 1974.

(b) The limitation of materials proscribed by 18 U.S.C. 1462 to those patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller (United States* v. *12 200- Ft. Reels of Film,* 413 U.S. 123) does not render 18 U.S.C. 1462 unconstitutionally vague as it was construed prior to *Miller. Hamling, supra,* slip op. at 20-25.

(c) *Miller's* rejection of *Memoirs'* "social value" formulation did not mean that 18 U.S.C. 1462 was unconstitutionally vague at the time of petitioners' convictions because it did not provide them with sufficient guidance as to the proper test of "social value" The social value formula was rejected in *Miller* not for reasons of vagueness but because it departed from *Roth's* obscenity definition and created a virtually impossible prosecutorial burden. *Hamling, supra,* slip op. at 26-27.

2. The indictment below was phrased in terms of the statute and was sufficiently definite to apprise petitioners of the charges against them. The statutory term "obscene" is a term of art and thus gave adequate notice to petitioners. *Hamling, supra,* slip op. at 27-29.

3. The district court instructed the jury that the government must show that petitioners had knowledge of the character of the contents of the publications at the time they caused them to be transported to Louisiana and received by them in the state. This *scienter* ruling was constitutionally sufficient. *Rosen* v. *United States,* 161 U.S. 29. The evidence was, as the court below found, sufficient to support the jury's verdict. *Hamling, supra,* slip op. at 29-34.

4. The trial court did not abuse its discretion by excluding allegedly comparable materials. "Expert" testimony had been allowed concerning relevant community standards. Moreover, similiar materials or judicial deter-

minations with respect thereto do not necessarily prove non-obscenity of the materials the accused is charged with bringing into Louisiana. *Hamling, supra,* slip op. at 35-37.

5. The review by the court of appeals under both the *Memoirs* and the *Miller* standard (see *United States* v. *Thevis,* 484 F. 2d 1149) did not violate *ex post facto* or due process principles. By allowing petitioners any benefits from either, the court did not make criminal any conduct that was legal prior to *Miller.* The enumeration of specific categories of obscene material in *Miller* did not purport to proscribe, for purposes of 18 U.S.C. 1462, conduct that had not previously been thought criminal, but instead added a "clarifying gloss" to the prior construction, making the statute's meaning more definite. *Bouie* v. *City of Columbia,* 378 U.S. 347, 353. *Hamling, supra,* slip op. at 25-26.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
NO. 73-1823

GARY VAN GUNDY, and
RIVERGATE NEWS AGENCY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INDEX

TABLE OF CONTENTS

Page

REASONS FOR FILING A REPLY BRIEF 1

REPLY BRIEF 2

CONCLUSION 8

TABLE OF CITATIONS

Cases

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 7
Carroll v. Comm'rs. of Princess Anne, 393 U.S.175 7
Dombrowski v. Pfister, 380 U.S. 479 7
Freedman v. Maryland, 30 U.S.51 7
Hamling v. United States, ___U.S. ___
41 L.Ed.2d 590 2,3,4,5,6,7
Jacobellis v. Ohio, 378 U.S. 184, 199 4
Kingsley Books, Inc. v. Brown, 354 U.S. 436 7
Memoirs v. Massachusetts, 383 U.S. 413 2,3
Miller v. California, 413 U.S.15 2,4,6,7
Roth v. United States, 354 U.S.476 7
Shelton v. Tucker, 364 U.S. 479 7
Smith v. California, 361 U.S.147 7
Speiser v. Randall, 357 U.S.513 7
United States v. Orito, 413 U.S. 139 5
United States v. Thevis, 484 F.2d 1149 5

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REASON FOR FILING A REPLY BRIEF

The Petitioners respectfully file this Reply to the Memorandum of the United States in Opposition to Petition for a Writ of Certiorari, pursuant to Rule 24(4) of this Court. Petitioners state that this Reply is "addressed to arguments first raised in the briefs in opposition . . . "

REPLY BRIEF

1. In its Memorandum, the Government argues that Petitioners were not prejudiced by the use of national standards, citing *Hamling v. United States*, ____ U.S. ___, 41 L.Ed.2d 590 as support, and also argues that the Petitioners received the benefits of both the *Memoirs v. Massachusetts*, 383 U.S. 413 and *Miller v. California*, 413 U.S. 15. A more precise analysis indicates that these two arguments of the Government are fully without substance.

After the Petition for Writ of Certiorari was filed in this case, this Court decided *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590. In *Hamling*, one of the issues this Court addressed itself to was the use of national community standards in the trial court's instructions to the jury. In rejecting the Petitioners claims that the use of national standards prejudiced them because of this Court's holding in *Miller v. California*, 413 U.S. 15, Mr. Justice Rehnquist said that:

> . . . there is no doubt that its *occasional references* to the community standards of the "country as a whole" delineated a wider geographical area than would be warranted by *Miller*, *12 200-ft. Reels of Film*, and our construction of section 1461 herein, *ante*, at ____. Whether petitioners were materially prejudiced by these references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in

> requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group. *Miller v. California, supra,* 413 U.S. at 33; *Mishkin v. New York,* 383 U.S. 502, 508-509 (1966); *Roth v. United States,* 354 U.S. 476, 489 (1957). The District Court's instructions in this case, *including its* reference to the standards of the "country as a whole," undoubtedly accomplished this purpose.

____ U.S. ____ 41 L.Ed.2d at 614-15 (emphasis supplied).

It is thus clear that *Hamling* is not "on all fours" with the facts presented herein. In the trial court below, the instructions centered solely on national standards, whereas the jury instructions in *Hamling* contained mixed references to both local and national community standards. The Court of Appeals for the Fifth Circuit claimed to give the Petitioner the benefit of both the *Roth-Memoirs* standards and the *Miller* standards, 490 F.2d at 77, but gave no support for such a claim. The trial of Petitioners proceeded on a theory of national standards, and the Petitioners were not charged with violating the local standards of New Orleans, Louisiana. Indeed, they were not given an opportunity to present evidence and a defense regarding such standards. There was thus no evidence adduced at trial and present in the record for the Court of Appeals to make a determination that local community standards had been contravened and upon which it could assert that the Petitioners were being given the "benefit" of *Miller.*

A comparison of the "occasional references" in *Hamling* with the homogeneous instructions herein is a comparison of apples and oranges. There were no occasional references here, but references *solely* to national standards. Mr. Justice Rehnquist in announcing this Court's decision in *Hamling* stated:

> A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz v. Pennsylvania R. Co.*, 350 U.S. 573, 525-526 (1956).
>
> * * * * *
>
> The result of the *Miller* cases. . . . as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion "the average person applying contemporary community standards" would reach in a given case.

____ U.S. ____, 41 L.Ed.2d at 613.

As this Court approved in *Miller* Mr. Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199, that community standards did not equate with national standards, and as local community standards were first definitively

enunciated by this Court in *Hamling*, then the judgment below cannot stand because the Petitioners were deprived of due process of law because of conviction of a charge not made and on one theory not tired: local standards.

As stated above, Mr. Justice Rehnquist dismissed the "national standards" argument of the petitioner in *Hamling* because the jury instructions contained only non-prejudicial "references" to the "country as a whole":

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction would have materially affected the deliberations of the jury. Cf. *Namet v. United States*, 373 U.S. 179, 190-191 (1963); *Lopez v. United States*, 373 U.S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case.

____ U.S. ____, 41 L.Ed.2d at 615. If references to national standards are excised from this case, then there remains nothing on which a jury may base a conviction, and, therefore, *Hamling* requires reversal of the convictions herein.

2. The Court of Appeals below decided that the *scienter* requirement for conviction of the Petitioners had been met. 490 F.2d at 77. Relying on its opinion in *United States v. Thevis*, 484 F.2d 1149, and this Court's opinion in *United States v. Orito*, 413 U.S. 139, the Court of Appeals said that "Defendants' knowledge of the materials' sexual orientation is sufficient." 490 F.2d at 77. This by no means equates to *scienter*, and contrary to the Government's argument, it does not meet the requirements of *Hamling*.

As the Petitioners' Petition for a Writ of Certiorari stated, pp. 34-35 more than a general knowledge of the nature of the materials is required to show the requisite scienter. Also, the Petition pointed out that there was no competent evidence adduced at trial to support even this standard of the Court of Appeals. The Petitioners, apparently, have been borne out in their argument by this Court's decision in *Hamling, supra.*

Mr. Justice Rehnquist, writing of the *scienter* requirement for obscenity convictions under federal law, said:

> "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials." ____ U.S. ____ 41 L.Ed. 2d at 624.

It is clear from a reading of the record in this case that there wasn't a scintilla of evidence that the Petitioners had knowledge of the contents of the materials they distributed, nor that they knew either the character or the nature of the materials. Chief Justice Burger, writing for the majority of this Court in *Miller v. California*, 413 U.S. 15, said that:

> "... no one will be subject to prosecution for the sale of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conconduct ...
>
> * * * * *
>
> "... a majority of this Court has agreed to isolate 'hard core' pornography from expression protected by the First Amendment."

413 U.S. at 27, 29. Yet the Court of Appeals would deem that a general knowledge of the Petitioners that the material was sexual in orientation is a sufficient showing of *scienter!*

This Court has said that sex and obscenity are not synonymous. *Roth v. United States,* 354 U.S. 476. See *Miller v. California,* 413 U.S. 15. This being the case, then to hold that the Petitioner had the requisite *scienter* because he might have known of the materials' sexual orientation violates both the precepts of *Roth* and *Miller* on the one hand, and the tri-partite *scienter* test enunciated in *Hamling.* It is clear that not even one portion of the *Hamling* test has been met, there being no proof adduced at trial. With no showing of *scienter,* then a conviction cannot be had; or if it be had, then it would violate the holding of this Court in *Smith v. California,* 361 U.S. 147, condemning absolute criminal liability in obscenity cases. The only way whereby one might then avoid prosecution would be by engaging in self-censorship, a device scorned by this Court. *Carroll v. Comm'rs. of Princess Anne,* 393 U.S. 175; *Freedman v. Maryland,* 380 U.S. 51; *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, See *Dombrowski v. Pfister,* 380 U.S. 479; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Shelton v. Tucker,* 364 U.S. 479; *Speiser v. Randall,* 357 U.S. 513.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
NO. 73-1823

GARY VAN GUNDY, and
RIVERGATE NEWS AGENCY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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INDEX

TABLE OF CONTENTS

	Page
Petition for Rehearing	1
Conclusion	14

TABLE OF CITATIONS

Cases

Bantam Books, Inc. v. Sullivan, 372 U.S. 58	13
Carroll v. Commissioners of Princess Anne, 393 U.S. 175	13
Dombrowski v. Pfister, 380 U.S. 479	13
Freedman v. Maryland, 380 U.S. 51	13
Gruenwald v. United States, 353 U.S. 391	13
Hamling v. United States, ____ U.S. ____ 41 L. Ed. 2d 590	2,4,6,7,8,9,10,11,13
Jacobellis v. Ohio, 378 U.S. 18,	9
J-R Distributors, Inc. v. Washington, No. 73-937	4
Jenkins v. Georgia, ____ U.S. ____ 41 L.Ed. 2d 642	2,4,5,6,10,11
Kingsley Books, Inc. v. Brown, 354 U.S. 436	13
McNabb v. United States, 365 U.S. 646	13
Marshall v. United States, 360 U.S. 310	13
Miller v. California, 413 U.S. 15	7,8,10,11,12,13

Page

Roth v. United States, 354 U.S. 476 12,13
Shelton v. Tucker, 364 U.S. 479 13
Smith v. California, 361 U.S. 147 13
Speiser v. Randall, 357 U.S. 513 13

Trinkler v. Alabama, No. 73-844 4

United States v. Orito, 413 U.S. 139 11
United States v. Thevis, 484 F.2d 1149 11

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TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING

Petitioners GARY VAN GUNDY and RIVERGATE NEWS AGENCY, INC. respectfully present this Petition for Rehearing and pray the Court for an Order vacating its denial of

the Petition for Writ of Certiorari entered on November 11, 1974, and granting the Petition. The Petition for Rehearing is confined to substantial grounds available to Petitioners, although not previously presented, and to intervening circumstances of substantial and controlling effect.

1. In Hamling v. United States, ___ U.S. ___, 41 L.Ed.2d 590 and Jenkins v. Georgia, ___ U.S. ___, 41 L.Ed.2d 642, this Court reaffirmed its position that when presented with the question, it would exercise an independent judicial review of the obscenity vel non of material in a constitutional sense. Petitioners herein in their Petition did desire serious attention and review of the issue of obscenity vel non. A reading of the Petition at pages 37-39 indicate that this issue was presented with accu-

racy, brevity, and clearness. Petitioners' argument stated that:

> As a matter of law the publications herein are entitled to constitutional protection. Each of the publications is not utterly without redeeming social value or importance and these publications have serious literary, artistic and scientific value. The publications are similar to and in no way significantly different from publications which were held to be entitled to constitutional protection by this Court. Weiner v. California, 404 U.S. 988; Burgin v. South Carolina, 404 U.S. 806; Pinkus v. Pitchess, 429 F.2d 416 (9 Cir. 190), affirmed sub. nom. California v. Pinkus, 400 U.S. 922.

This Court's decision in Hamling and Jenkins clearly establish a judicial responsibility for an independent determination of obscenity vel non. But such responsibility was unclear at the time of the non-jury trial and circuit appeal, and those courts each exercised different views of the constitutional protection afforded to the press materials.

Trinkler v. Alabama, No. 73-844, raised the same argument of non-obscenity, and requested an independent judicial review. The materials therein were certified to this Court, and those materials are markedly similar to the press materials at Bar. This Court granted certiorari and vacated and remanded Trinkler for reconsideration in light of Hamling and Jenkins.

Mr. Justice White said in J-R Distributors, Inc., No. 73-937, that he joined in denying certiorari in three cases

partially because the courts below had determined obscenity vel non. However, in Jenkins, a finding of obscenity in the court below did not preclude reversal of that decision by this Court. Mr. Justice Rehnquist said for this Court that:

> Appellee contends essentially that under *Miller* the obscenity *vel non* of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of *Miller* to evaluate appellee's contention ....
>
> But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," 413 U.S. at 25, but we made it plain that under that

> holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . ." 413 U.S., at 27.

___ U.S. ___, 41 L.Ed.2d at 649-650.

The Petitioners' case thus clearly falls within the independent review described above in Jenkins.

2. This Court in *Miller v. California*, 413 U.S. 15, rejected "national community standards" as unworkable and an exercise in futility. In his dissent to the denial of certiorari herein, Mr. Justice Brennan (Stewart and Marshall, J.J., joining) stated that:

> Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling v. United States*, — U.S. — (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

After the Petition for Writ of Certiorari was filed in this case, this Court decided *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590. In *Hamling*, one of the issues this

Court addressed itself to was the use of national community standards in the trial court's instructions to the jury. In rejecting the Petitioners claims that the use of national standards prejudiced them because of this Court's holding in *Miller v. California*, 413 U.S. 15, Mr. Justice Rehnquist said that:

> . . . there is no doubt that its *occasional references* to the community standards of the "country as a whole" delineated a wider geographical area than would be warranted by *Miller, 12 200-ft. Reels of Film*, and our construction of section 1461 herein, *ante*, at ____. Whether petitioners were materially prejudiced by those references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group. *Miller v. California, supra*, 413 U.S. at 33, *Mishkin v. New York*, 383 U.S. 502, 508-509 (1966); *Roth v. United States*, 354 U.S. 476, 489 (1957). The District Court's instructions in this case, *including its* reference to the standards of the "country as a whole," undoubtedly accomplished this purpose.

____ U.S. ____, 41 L.Ed.2d at 614-15 (emphasis supplied).

It is thus clear that *Hamling* is not "on all fours' with the facts presented herein. In the trial court below, the instructions centered solely on national standards, whereas the jury instructions in *Hamling* contained mixed references to

both local and national community standards. The Court of Appeals for the Fifth Circuit claimed to give the Petitioner the benefit of both the *Roth-Memoirs* standards and the *Miller* standards, 490 F2d at 77, but gave no support for such a claim. The trial of Petitioners proceeded on a theory of national standards, and the Petitioners were not charged with violating the local standards of New Orleans, Louisiana. Indeed, they were not given an opportunity to present evidence and a defense regarding such standards. There was thus no evidence adduced at trial and present in the record for the Court of Appeals to make a determination that local community standards had been contravened and upon which it could assert that the Petitioners were being given the "benefit" of *Miller*.

A comparison of the "occasional references" in *Hamling* with the homogeneous instructions herein is a comparison of apples and oranges. There were no occasional references here, but references *solely* to national standards. Mr. Justice Rehnquist in announcing this Court's decision in *Hamling* stated:

> A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz v. Pennsylvania R. Co.*, 350 U.S. 573, 525-526 (1956).
>
> * * * * *
>
> The result of the *Miller* cases. . . . as a matter of

> constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion "the average person applying contemporary community standards" would reach in a given case.

_____U.S. ____, 41 L.Ed.2d at 613.

As this Court approved in *Miller*, Mr. Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199, that community standards were first definitively enunciated by this Court in *Hamling*, then the judgment below cannot stand because the Petitioners were deprived of due process of law because of conviction of a charge not made and on one theory not tried: local standards.

As stated above, Mr. Justice Rehnquist dismissed the "national standards" argument of the petitioner in *Hamling* because the jury instructions contained only non-prejudicial "references" to the "country as a whole":

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction would have materially affected the deliberations of the jury. Cf. *Namet v. United States*, 373 U.S. 179, 190-191 (1963); *Lopez v. United States*, 373 U.S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case.

____ U.S. ____ 41 L.Ed.2d at 615. If references to national standards are excised from this case, then there remains nothing on which a jury may base a conviction, and,

therefore, *Hamling* requires reversal of the convictions herein.

Mr. Justice Rehnquist stated in *Hamling* that:

> While the language of 18 U.S.C. § 1461 has remained the same throughout this litigation, the statute defines an offense in terms of "obscenity," and this Court's decisions at least since *Roth v. United States, supra,* indicate that there are constitutional limitations which must be borne in mind in defining the statutory term. Thus any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case.

_____ U.S. _____, 41 L.Ed.2d, at 611. See also *Jenkins v. Georgia* _____ U.S. _____, 41 L.Ed.2d 642, 647. Mr. Justice Rehnquist thus recognized the need for fundamental fairness and due process of law when there exists, as here, a dichotomy between the law when an action occurs and the law when that action is the subject of a prosecution.

From this position, Mr. Justice Rehnquist in *Jenkins* went on to evaluate the "community standards" used in the Georgia Courts, and held that even though "community" need not be specifically defined, jurors are to draw upon their knowledge of their vicinage. Additionally, *Jenkins* held, based upon *Miller's* definition of "obscenity" and the statement therein that only "hard-core" pornography was to be proscribed, that juries do not have "unbridled discretion" in its decisions.

If the Petitioners were to be given the benefit of *Miller's* new constitutional standards, as this Court in *Hamling* and

Jenkins said they are entitled to, then it is clear that the press materials are not obscene when measured against community standards, something not done in the trial level court below. The Petitioners have thus been denied of due process of law because of the use of improper standards, because of the dichotomy between the standards applied in the trial and appellate levels, because the appellate court on remand acted as a trier of fact rather than a body of review, and because the materials are not obscene under the standards enumerated in *Miller*.

3. The Court of Appeals below decided that the *scienter* requirement for conviction of the Petitioners had been met. 490 F.2d at 77. Relying on its opinion in *United States v. Theris*, 484 F.2d 1149, and this Court's opinion in *United States v. Orito*, 413 U.S. 139, the Court of Appeals said that "Defendants' knowledge of the materials' sexual orientation is sufficient." 490 F.2d at 77. This by no means equates to scienter, and contrary to the Government's argument, it does not meet the requirements of Hamling.

As the Petitioner's Petition for a Writ of Certiorari stated, pp. 34-35 more than a general knowledge of the nature of the materials is required to show the requisite scienter. Also, the Petition pointed out that there was no competent evidence adduced at trial to support even this standard of the Court of Appeals. The Petitioners, apparently, have been borne out in their argument by this Court's decision in *Hamling, supra*.

Mr. Justice Rehnquist, writing of the *scienter* requirement for obscenity convictions under federal law, said:

> "It is constitutionally sufficient that the prosecution
> It is constitutionally sufficient that the prosecution
> show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials." ____ U.S. ____ 41 L. Ed. 2d at 624.

It is clear from a reading of the record in this case that there wasn't a scintilla of evidence that the Petitioners had knowledge of the contents of the materials they distributed, nor that they knew either the character or the nature of the materials. Chief Justice Burger, writing for the majority of this Court in *Miller v. California*, 413 U.S. 15, said that:

> "... no one will be subject to prosecution for the sale of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct ...
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> "... a majority of this Court has agreed to isolate 'hard core' pornography from expression protected by the First Amendment."

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This Court has said that sex and obscenity are not synonymous. *Roth v. United States*, 354 U.S. 476. See *Miller v. California*, 413 U.S. 15. This being the case, then to hold that the Petitioner had the requisite *scienter* because he might

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4. The Petitioners have not retraced their arguments contained in the Petition for Writ of Certiorari. Rather, they have presented both intervening circumstances of substantial and controlling effect and substantial grounds not previously presented in their request for a rehearing. Based upon this Court's supervisory powers over the Federal Courts in the area of the administration of criminal justice, Petitioners hereby request that their Petition be granted so that the ends of Justice can best be served. *See, McNabb v. United States*, 365 U.S. 646; *Marshall v. United States*, 360 U.S. 310; *Gruenwald v. United States*, 353 U.S. 391

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioners pray that this Court grant rehearing of the Order of Denial, vacate that Order, grant the Petition, and review the Judgment and Opinion below.

Respectfully submitted,

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